

Insurance - Construction of "Omnibus" Provisions

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or a misnomer¹⁰ and as such the trend is not to extend it¹¹ beyond the cases of fraud or cases of settled part performance.¹² It is generally recognized that any greater liberalization of the doctrine, so as to include acts which are factually referable but legally unrelated, would amount to a practical abrogation of the policy of the Statute of Frauds.¹³

ROBERT E. SHARP

Insurance—Construction of "Omnibus" Provisions—On December 20, 1948, plaintiff was driving a truck of his employer, Omar, Incorporated, in the course of his employment. It was one of four vehicles, three of them Omar trucks and one of them a private automobile owned and driven by Paul Wimmer, all of them being driven from Beloit to Milwaukee. Plaintiff's truck was second in line. All four drivers were employees of Omar and all were in the course of their employment.

A Midland Coach Lines bus was being driven in the opposite direction on the highway. After colliding with one of the Omar trucks, the bus struck the plaintiff's truck, and plaintiff received injuries for which he sought damages against Midland Coach Lines and Hartford Accident and Indemnity Company, Midland's insurer. These defendants interpleaded and cross-complained against the other Omar drivers involved, Omar, Incorporated, and London Guarantee and Accident Company, Ltd., Omar's insurer. On the basis of its contract with Omar, and on the authority of *Schneider v. Depies*,¹ which had just been decided, London Guarantee brought a motion for summary judgment. The motion was denied and London Guarantee appealed. *Held*: Affirmed. *Shanahan v. Midland Coach Lines*, 268 Wis. 233, 67 N.W. 2d 297 (1954).

The omnibus clause for the State of Wisconsin is found at Section 204.30(3), Wis. Stats. (1953), and provides:

"No such policy shall be issued or delivered in this state to the owner of a motor vehicle, unless it contains a provision reading substantially as follows: 'The indemnity provided by this policy

¹⁰ *Fairall v. Arnold*, 226 Iowa 977, 285 N.W. 664 (1939); *Trebesch v. Trebesch*, 130 Minn. 368, 153 N.W. 754 (1915).

¹¹ 35 MINN.L.REV. 1 (1950); 78 U.OFPA.L.REV. 51.

¹² See footnote 15, 3 AMERICAN LAW OF PROPERTY §11.7 for list of articles sustaining this trend in the various jurisdictions.

¹³ 49 AM. JUR. 533; 37 MINN.L.REV. 459. In England there has been a movement to abolish the Statute of Frauds, as pointed out in 70 LAW Q. REV. 441. However this has generally been resisted in the United States, as is pointed out in *French v. Mitchell*, 92 Colo. 532, 22 P.2d 644 (1933) where Justice Bouck writes, "Nevertheless the statute has survived these attacks; and the tendency of modern decisions is to maintain its substantial provisions according to its true spirit and purpose and not to indefinitely multiply exceptions thereto."

¹ *Schneider v. Depies*, 266 Wis. 43, 62 N.W.2d 431 (1954).

is extended to apply, in the same manner and under the same provisions as it is applicable to the named assured, to any person or persons while riding in or operating any automobile described in this policy when such automobile is being used for purposes and in the manner described in said policy. Such indemnity shall also extend to any person, firm, or corporation legally responsible for the operation of such automobile. The insurance hereby afforded shall not apply unless the riding, use, or operation above referred to be with the permission of the assured named in this policy, or if such assured is an individual, with the permission of an adult member of such assured's household other than a chauffeur or domestic servant; provided, however, that no insurance afforded by this paragraph shall apply to a public automobile garage or an automobile repair shop, sales agency, service station, and/or the agents or employees thereof. In the event an automobile covered by this policy is sold or transferred, the purchaser or transferee shall not be an additional insured without consent of the company, indorsed hereon.

It will be noted that the only exceptions that the statute makes from its operation are public automobile garages, automobile repair shops, sales agencies, service stations, and/or the agents or employees thereof.² We can quickly perceive that these exceptions have no application in the instant situation. The policy of the statute is crystal clear. It is well established that *any* intended limitation of the omnibus coverage provision required by the statute other than the exceptions expressly authorized therein, is void.³

The policy issued by London Guarantee to Omar contained the following provision:

"III. Definition of Insured.

With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission. The insurance with respect to any person or organization other than the named insured does not apply: * * *

"(b) to any employee with respect to injury to or sickness, disease, or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer."⁴

Thus, the Wisconsin Supreme Court said that this provision was void,

² *Narloch v. Church*, 234 Wis. 155, 290 N.W. 595 (1940).

³ *Schenke v. State Farm Mut. Auto. Ins. Co.*, 246 Wis. 301, 16 N.W.2d 817 (1944).

⁴ *Shanahan v. Midland Coach Lines*, 268 Wis. 233, 67 N.W.2d 297 (1954).

"* * * because it provides for an exception applicable solely to an additional insured."⁵

In other words, it gave less coverage to an additional insured than it did to the named insured, though only with respect to injury to other employees. Since the clause was void, the motion for summary judgment could not be granted, and the Supreme Court affirmed the order denying the motion.⁶

However, the policy also contained the following clause in the Exclusion provisions:

"This policy does not apply: * * *

(d) under coverage A and C, to bodily injury to or sickness, or death of any employee of the insured while engaged in the employment, other than domestic, of the insured * * *."⁷

But why was the case appealed if it could be disposed of so easily and so summarily?

The confusion in this area dates back at least as early as 1938 to the case of *Brandt v. Employer's Liability Assurance Corp.*⁸ The policy in that case contained a clause in the coverage provisions similar to that found in the *Shanahan* case and another clause in the Exclusion provision which, though not considered, was probably valid because an analysis reveals that that clause applied to both the named assured and additional assureds.

The clauses provided as follows:

"Definition of Insured * * * The provisions of this paragraph do not apply: * * *

(d) to any employee of an insured with respect to any action brought against said employee because of bodily injury to or death of another employee of the same insured injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such insured * * *.

Exclusions

This policy does not apply: * * *

(e) under Coverage A, to bodily injury to or death of any employee of the insured while engaged in the business of the insured * * *."

The most interesting point is that the Court held that the insurer *was* excused from liability by the clause in the *coverage provisions* which can hardly be distinguished from the form and location of the clause in the *Shanahan* case. Thirteen years later, however, the *Brandt* case was expressly overruled.⁹

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Brandt v. Employer's Liability Assurance Corp.*, 228 Wis. 328, 280 N.W. 403 (1938).

⁹ *Sandstrom v. Estate of Clausen*, 258 Wis. 534, 46 N.W.2d 831 (1951).

In 1940 in the *Narloch* case the Court ruled that the identical clause in the identical place was void as in violation of the statute.¹⁰ The policy read as follows:

"This policy does not apply: * * *

- (d) To any employee of an insured with respect to any action brought against said employee because of bodily injury to or death of another employee of the same insured injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such insured."

The Court stated:

"As the intended limitation by sub. (d) of the policy upon the extensions of the indemnity is not within any of the exceptions which are authorized under sec. 204.30(3), Stats., that intended limitation is clearly in violation of the statute and therefore void."¹¹

Though the precise language no longer seems to be applied in these cases, we can see that the clause gave less protection to an additional assured than to a named assured and therefore was void under the *Frye* test which was to arise a few years later.¹²

The *Brandt* case¹³ of two years previous, though cited in the opinion, was not discussed with reference to this clause and though expressly distinguished on another point was not distinguished with reference to this point. The *Narloch* holding¹⁴ is, of course, in accord with *Shanahan*¹⁵ and the subsequent overruling of *Brandt*.¹⁶ *Schenke v. State Farm*¹⁷ also held that a restriction in the omnibus coverage clause against any action by a named insured was void as contrary to the statute.

*Ainsworth v. Berg*¹⁸ decided after *Schenke*, dealt with general exclusion provisions. There we had an insured truck, two employers in the course of employment, negligence of one employee, the other employee suing for his injuries. The court apparently paid no attention to the argument that an exclusion would give less protection to the employee than the named insured and therefore violated the purpose of the omnibus statute. The court held the exclusion valid. This holding would probably no longer be sustained under the *Frye* test,

¹⁰ Note 2, *supra*.

¹¹ *Ibid*.

¹² *Frye v. Thiege*, 253 Wis. 596, 600, 34 N.W.2d 793 (1948).

¹³ Note 8, *supra*.

¹⁴ Note 2, *supra*.

¹⁵ Note 4, *supra*.

¹⁶ Note 9, *supra*.

¹⁷ Note 3, *supra*.

¹⁸ *Ainsworth v. Berg*, 253 Wis. 438, 34 N.W.2d 79, 35 N.W.2d 911 (1948).

though the case was cited, nor would the Court's reasoning hold up in view of the *Sandstrom*¹⁹ case.

The *Sandstrom* case found that the Court applying the argument of earlier cases that "employee of the insured" means employee of the person being sued. Thus, the exclusion was not applied and our inquiry was not directly aided. This *Sandstrom* rule was recently affirmed in *Zippel v. Country Gardens, Inc.*²⁰

The *Frye* case²¹ also dealt with a clause in the exclusion provisions and held the clause to be valid. It was argued that the clause located in the exclusion provisions was invalid even though not located in the coverage provisions. The Court said:

"It is urged with considerable force that it ought not to make a difference where the exclusion is placed in the policy because that is a mere mechanical detail. The point is well taken to this extent; *if what is stated in the policy to be a general exclusion of coverage in fact denies to an additional assured the same protection that is given to the named assured neither its form nor its location in the policy will save it or give it validity.*"²² (Emphasis Supplied)

Thus, with the *Brandt*²³ case out of the way, the other cases in this area seemed at this point to fall into some sort of an intelligible pattern. On the one hand we had those cases which generally concerned clauses in the coverage provisions of a policy, which clauses were ruled void, and on the other hand those cases which dealt with clauses in the exclusion provisions of a policy, which clauses were from case to case qualifiedly held valid. (Even these exclusion clauses impress this writer as being violative of the Statute if, de facto, the coverage clauses are.)

Without acknowledging the validity of this dichotomy, we can observe its existence and recognize its supporting arguments at least up to the *Frye*²⁴ case. For, while it appeared that certain clauses, located in the exclusion provisions of a policy could be valid under the statute, the *Frye*²⁵ case seemed to lay down a reasonable test for their validity. To reiterate some language in *Frye* that has been quoted above:

"* * * if what is stated in the policy to be a general exclusion of coverage in fact *denies to an additional assured the same protection that is given to the named assured*, neither its form nor

¹⁹ Note 9, *supra*.

²⁰ *Zippel v. Country Gardens, Inc.*, 262 Wis. 567, 55 N.W.2d 903 (1952).

²¹ Note 12, *supra*.

²² *Ibid.*

²³ Note 8, *supra*.

²⁴ Note 12, *supra*.

²⁵ *Ibid.*

its location in the policy will save it or give it validity."²⁶ (Emphasis Supplied).

This language, of course, is in accord with the reasoning in the *Shanahan*²⁷ case and appears to be a clear statement of what should be allowed in an automobile insurance policy under the statute.

What is difficult, then, is a reconciliation of the Supreme Court's position in the *Frye*²⁸ case, the recent *Depies*²⁹ case (upon which appellant in the instant case relied) and its decision in the *Shanahan*³⁰ and *Narloch*³¹ cases. In *Depies*³² an employee of Depies killed a fellow employee by negligently backing into him with a truck owned by Depies who was insured by Farmers Mutual Automobile Insurance Company. In that case the insurance company was held not liable. The insurance contract contained the following provision:

"Exclusions:

This policy does not apply: * * *

(b) (2) * * * to bodily injury to or sickness, disease or death of any employee of the insured while engaged in the employment, other than domestic, of the insured * * *.

(c) (3) to any *employee* with respect to injury to or sickness, disease or death of another employee of the same employer insured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer."³³ (Emphasis Supplied).

With the *Sandstrom*³⁴ case in mind we can see what the insurer was attempting to accomplish by the clause in its policy in *Depies*.³⁵ By saying that the policy does not apply to any *employee* with respect to injury to a fellow *employee*, the insurer gets around the argument sustained in *Sandstrom*³⁶ and *Zippel*³⁷ that "employee" means employee of the person being sued. However, while the *Depies* clause gets around *Sandstrom*,³⁸ it appears to run contrary to *Frye* because the clause seems to give less protection to an additional assured than the named assured.

But close examination of the policy in the *Depies* case reveals that the *Frye* doctrine was fulfilled to the satisfaction of the Court. The Court said that the additional assured was not given less protection

²⁶ *Ibid.*

²⁷ Note 4, *supra*.

²⁸ Note 12, *supra*.

²⁹ Note 1, *supra*.

³⁰ Note 4, *supra*.

³¹ Note 2, *supra*.

³² Note 1, *supra*.

³³ *Ibid.*

³⁴ Note 9, *supra*.

³⁵ Note 1, *supra*.

³⁶ Note 9, *supra*.

³⁷ Note 20, *supra*.

³⁸ Note 9, *supra*.

than the named assured because of another clause in the policy [(b) (2)].³⁹ Thus, the question under the *Frye* doctrine was, is each clause tested separately, or is the policy considered as a whole? The court apparently decided to consider the policy as a whole and upheld the exclusion provision.⁴⁰

With this fact in mind it is difficult to recognize any real distinction between *Depies*⁴¹ and *Shanahan*.⁴² If any, it should be a result of application of the *Frye*⁴³ case.

In *Depies*⁴⁴ the additional assured was not afforded less protection than the named assured because there was another clause in the policy which restricted the coverage of the named assured in the same way.

Neither in *Shanahan*⁴⁵ was the additional assured *actually* afforded less protection than the named assured by virtue of the clause located in the coverage provisions because of the other clause in Exclusions (quoted above)⁴⁶ which is identical to clause (b) (2) in *Depies*.⁴⁷ Was it the mere location of the clause then, and not the effect of the policy construed as a whole, as it seems it should have been construed under *Frye*⁴⁸ and *Depies*,⁴⁹ that caused the Court to hold that the clause was void?

The Court pointed out in *Shanahan*⁵⁰ that the old type exclusion clause (in the Exclusion provisions) could not help London Guaranty because, under *Sandstrom*⁵¹ and *Zippel*,⁵² the plaintiff was not an employee of the additional assured. What the court should have recognized, considering the whole policy, is that this clause brought about a situation where the named assured and additional assureds were afforded the same protection and thus, the *Frye*⁵³ test was met.

One can conjecture, however, that London Guaranty has revised its Wisconsin policies to take advantage of the law of *Depies*.⁵⁴ And though it is beyond the scope of this paper, I merely offer in passing that perhaps the *Depies* line of cases goes beyond the statute. Let me refer to some language from *Narloch*:

"As the intended limitation by sub.(d) of the policy upon the

³⁹ Note 1, *supra*.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Note 4, *supra*.

⁴³ Note 12, *supra*.

⁴⁴ Note 1, *supra*.

⁴⁵ Note 4, *supra*.

⁴⁶ Reference of note 7, *supra*.

⁴⁷ Reference of note 33, *supra*.

⁴⁸ Note 12, *supra*.

⁴⁹ Note 1, *supra*.

⁵⁰ Note 4, *supra*.

⁵¹ Note 9, *supra*.

⁵² Note 20, *supra*.

⁵³ Note 12, *supra*.

⁵⁴ Note 1, *supra*.

extension of the indemnity is not within any of the exceptions which are authorized under sec. 204.30(3), Stats., that intended limitation is clearly in violation of the statute and therefore void."⁵⁵

Subsection (d) is quoted above⁵⁶ and is a typical exclusionary clause. In 1940 the Court was disposed to thinking that such a provision was "clearly in violation of the statute" without mentioning its location in the policy.⁵⁷

As late as 1948 in *Frye* the Court stated:

" * * * any intended limitation of the omnibus coverage provision required by 204.30(3), Stats., other than the exceptions expressly authorized by the statute, is void."⁵⁸

In 1948 this strict concept apparently gave way to the idea that the statute does not interfere with the right to limit coverage by contract.⁵⁹ Has the court created an easy way to introduce exceptions to the statute into a contract?

The case law in this area appears to make it comparatively simple to test the validity of a clause with respect to the statute. Still, this question arises, since the effect of the provisions in the *Depies* policy would be identical to the effect of the provisions in the *Shanahan* policy if given effect, why should *Shanahan*⁶⁰ have given weight to the following language in *Frye*?

"On the other hand, we have held in the *Narloch* and *Schenke* cases that there can be no modification whatever attached to the *omnibus coverage clause*. An exclusion purporting to be a part of this clause is assumed from its location to be discriminatory and in any case is held to be void as an intent to add to statutory exceptions."⁶¹ (Emphasis Supplied).

Does this mean that *Shanahan*⁶² has actually held that location will rule over effect? Chief Justice Fairchild in his dissent in *Frye* indicated that it should not.

"I submit that such a technicality should not be allowed to defeat the avowed purpose of the statute."⁶³

The discernable reasoning given for this state of the law is as follows: By putting these clauses in the Exclusion provisions of a policy, the parties are only exercising their right of freedom of con-

⁵⁵ Note 2, *supra*.

⁵⁶ Reference of note 11, *supra*.

⁵⁷ Note 2, *supra*.

⁵⁸ Note 12, *supra*.

⁵⁹ Note 18, *supra*.

⁶⁰ Note 4, *supra*.

⁶¹ Note 12, *supra*.

⁶² Note 4, *supra*.

⁶³ Note 12, *supra*.

tract.⁶⁴ As has been demonstrated, this argument ignores the ultimate operative effect of the clauses which overreach the statute just as do the same clauses in the coverage provisions. If the clauses are allowed in one case, they should be allowed in all cases.

W. URBAN ZIEVERS

⁶⁴ Note 18, *supra*.